Government vs. Commercial Contracts: Specific Comparisons Between the FAR and the UCC

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Three Part Comparison

• **Uniform Commercial Code**
  - Contractual “presumptions” applicable to commercial transactions between merchants
  - Party-neutral

• **Federal Acquisition Regulation**
  - Largely mandatory terms and conditions appropriate for contracts between a private contractor and the Government
  - Favors the Government and the taxpayer

• **FAR Part 12 - Government Acquisition of Commercial Items**
  - Acknowledges that typical Government contract methods are not effective for acquisition of commercial items
  - Middle ground between “Traditional FAR” and UCC
The Uniform Commercial Code

- Article Two: Contracts For Sale Of Goods, Entitled “Sales”
- Article Two Intends To Codify the Common Law
  - Largely adopted by 49 states (except Louisiana) and Washington D.C.
- Fundamental Purposes [UCC 1-103(a)]
  - To simplify, clarify and modernize the law governing commercial transactions
  - To permit continued expansion of commercial practices through custom, usage and agreement, and
  - To make uniform the laws of various jurisdictions
- Designed To Facilitate The Free Flow Of Commerce
  - Supplies reasonable substitutes for missing terms
  - Unless the contract states otherwise, UCC presumptions apply
The Federal Acquisition Regulation

- The “Traditional FAR”
  - Tool to ensure material terms are in writing
  - Unlike UCC, FAR provisions cannot be “tailored”
  - Favors one contracting party (Government) over the other to protect the taxpayer

- The “Commercial Item” FAR
  - FAR Part 12: governs Government acquisition of commercial items
  - Relies on market to regulate price and quality
  - Some commercial item acquisition provisions can be “tailored” [exceptions to tailoring, See FAR 12.302(b)]
FAR v. UCC

- Recognize The Different Interests Of The Respective Buyers And Sellers
  - FAR reflects the power of Government as Buyer
  - UCC balances interests of Buyer and Seller
  - FAR Part 12: Recognizes that typical FAR provisions are unnecessary when Government buys commercial items
    - Middle ground between “Traditional FAR” & UCC
FAR Part 12 Procurements

• Federal Acquisition Streamlining Act (FASA) of 1994 (Public Law 103-355)
• Acquisition of supplies or services that meet FAR 2.101 definition of “commercial item”
  ➢ Items customarily used by general public or non-governmental entities for non-governmental purposes
  ➢ Items not yet on market evolved from a commercial item through technological or performance advancements
  ➢ Modified commercial items
FAR Part 12 Procurements (cont’d)

- Acquisition of supplies or services that meet FAR 2.101 definition of “commercial item” (cont’d)
  - Installation, maintenance, repair and training services in support of a commercial item
  - Services of a type offered and sold competitively in substantial quantities in the commercial marketplace at catalog or market price for specific tasks of outcomes
  - Combination of commercial items
  - Nondevelopmental items developed exclusively at private expense and sold in substantial quantities on a competitive basis to state and local governments
Contract Formation

*Uniform Commercial Code - Commercial Transactions*

- Offer & Acceptance Need Not Be Unequivocal - Writing Not Required
  - UCC 2-207: expression of acceptance containing additional, non-material terms is still acceptance
  - UCC 2-305: failure to specify price is not fatal
- No Competition Requirements

*FAR - Government Non-Commercial Purchases*

- Offer And Acceptance Are Clear And Unequivocal
- Sealed Bidding Procedures (FAR Part 14) and Negotiated Procurements (FAR Part 15)
  - Written terms
  - Description of goods, price, place of delivery and inspection/acceptance terms
- Requirement Of Full And Open Competition (FAR Part 6)
**Contract Formation (cont’d)**

**Government Acquisition Of Commercial Items**

- **Solicitation And Evaluation Requirements**
  - Solicitation pursuant to FAR 12.204 (SF 1449) - “encouraged,” if simplified acquisition threshold not exceeded
  - Streamlined solicitation pursuant to FAR 12.603 - appropriate when FAR 12.204 not used
  - FAR 12.205 or 12.602 - evaluation and contracting officer acceptance

- **Formal Competition**
  - Both FAR 12.205 and FAR 12.603 discuss methods for evaluating and comparing multiple offers
  - FAR 13.500 – Test Program-simplified acquisition procedures appropriate for commercial item purchases not exceeding $6,500,000
Warranties

**UCC - Commercial Transactions**

- **Express And Implied Warranties**
  - **UCC 2-313: Express Warranty**
    - Affirmation of fact or promise which is part of the bargain
    - *i.e.*, description of goods or showing of sample
  - **UCC 2-314: Implied Warranty (Merchantability; Usage of Trade)**
    - Fair, average quality
    - Fit for ordinary purpose
  - **UCC 2-315: Implied Warranty (Fitness For Particular Purpose)**
    - Seller has reason to know the buyer’s intended use
    - Seller knows buyer is relying on seller’s expertise
Warranties (cont’d)

FAR - Government Non-Commercial Purchases

• FAR 52.246-17 and FAR 52.246-18: contain non-mandatory warranties for simple and complex items
  ➢ Each warrant that items are free from defects and will conform with requirements of the contract
  ➢ Each disclaim the implied warranties of fitness and merchantability

Government Acquisition Of Commercial Items

• FAR 52.212-4(o): Warrants Merchantability and Fitness
• Accommodates Commercial Tendencies - Offers No More Than Warranties Applied In Commercial Practice
• Negotiable
Inspection

**UCC - Commercial Transactions**

- **UCC 2-513 - Buyer’s Right To Inspection Of Goods**
  - Buyer can inspect prior to payment at any time, in any reasonable manner
  - Expenses of inspection borne by buyer, UNLESS goods are rejected
Inspection (cont’d)

FAR - Government Non-Commercial Purchases

• FAR 52.246 - Inspection Of Supplies
  ➢ Contractor must establish and maintain an inspection system acceptable to the Government
  ➢ Government retains right to inspect goods prior to acceptance
  ➢ Government retains right to review inspection documents during contract performance and for as long afterwards as the contract requires

Government Acquisition Of Commercial Items

• FAR 52.212-4(a) - Inspection/Acceptance For Commercial Items
  ➢ Seller warrants that the goods conform with the contract requirements
  ➢ Government retains right to inspect goods prior to acceptance
  ➢ Government has no right to examine inspection documentation
Unilateral Changes

**UCC - Commercial Transactions**

- Buyer Has No Right To Unilaterally Change A Contract
- UCC 2-209: Addresses Modification, Rescission And Waiver
  - Consideration not necessary to modify or change contract
  - Modifications must be in writing and bilateral

**FAR - Government Non-Commercial Purchases**

- FAR Part 43: Gives Government The Right To Unilaterally Change
- FAR 52.243 et seq.: Contracting Officer Change Orders Must Be Within General Scope Of The Contract
- Equitable adjustment of contract price and schedule

**Government Acquisition Of Commercial Items**

- FAR 52.212-4(c): Unless Contract Has A Changes Clause, Only Bilateral Modifications Are Permitted And They Must Be In Writing
Contractor Claims/Disputes

**UCC - Commercial Transactions**

- “Traditional” Litigation
- Defines Permissible Damages

**FAR - Government Non-Commercial Purchases**


- Constructive Changes - Also Give Rise to C.D.A. Procedures

**Government Acquisition Of Commercial Items**

- FAR 52.212-4(c) - Changes Can Be Made Only By Written Agreement Of The Parties
- FAR 52.212-4(d) - Disputes. Failure To Reach Agreement On Matters Arising Under Or Relating To The Contract Is A Dispute Subject To The C.D.A.
Terminations For Convenience

**UCC - Commercial Transactions**

- No Coverage Unless Negotiated Into Contract
- If Commercial Contract Contains Termination for Convenience Clause, Contract May Be Illusory If No Provision For Recovery Of Costs

**FAR - Government Non-Commercial Purchases**

- FAR Subparts 49.1 - 49.3: Gives Government The Right To Unilaterally Terminate A Contract For Convenience
- Government Can Do So When In Government’s “Interests” See FAR 49.101(b)
- Contractor Entitled To Cost Of Terminated Work Plus Profit on Costs Incurred
- If Cannot Reach Agreement: A “Dispute,” Subject To C.D.A. Procedures
- Government Maintains Audit Rights For 3 Years After Final Settlement
Terminations For Convenience (cont’d)

Government Acquisition Of Commercial Items

- FAR 12.403
  - Only when in Government’s “best interests”
  - Contractor entitled to % of price, based upon % of work performed plus reasonable termination costs
  - No Government audit rights
Cost or Pricing Data

**UCC - Commercial Transactions**
- Not Addressed

**FAR - Government Non-Commercial Purchases**
- Contractor Must Certify That It Has Given All Facts Which All Prudent Parties Would Expect To Impact Negotiations
- 10 U.S.C. § 2306a (TINA), 41 U.S.C. § 254(b) (Authorizing Audit and Inspection)
- Exceptions
  - Acquisition below minimum threshold -$700,000
  - Prices set by law
  - Determination of adequate price competition
  - Commercial item acquisitions

**Acquisition Of Government Commercial Items**
- Exempt From Disclosure
Audit Rights

**UCC - Commercial Transactions**

- No Coverage

**FAR - Government Non-Commercial Purchases**

- **52.215-2:** Audit and Records, Negotiation
  - Until 3 years from final payment
  - Proposal, pricing, negotiation and performance records
  - Access for Comptroller General or Contracting Officer

- Additional “Audit” Rights Under The Inspection Clause

**Government Acquisition Of Commercial Items**

- **FAR 52.212-5(d):** If Competitive, Exceeds Simplified Threshold And Excludes 52.215-2
  - Until three years from final payment
  - Access to “directly pertinent” records involving transactions related to the contract, not to pre-award disclosures or cost or pricing data
  - Access for Comptroller General
QUESTIONS ???